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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OLGA DOMÍNGUEZ CASTRO, SANDRA J. GUZMÁN HERNÁNDEZ, MILITZA LÓPEZ MATEO, CARLOS RIVERA FIGUEROA,

Petitioners,

v.

GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO, SECRETARY OF JUSTICE, HON. LUIS FORTUÑO, GOVERNOR OF THE COMMONWEALTH OF PUERTO RICO, DEPARTMENT OF JUSTICE, DEPARTMENT FOR THE FAMILY, BOARD OF FISCAL RESTRUCTURING AND STABILIZATION OF PUERTO RICO, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Puerto Rico

REPLY TO BRIEF IN OPPOSITION

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Pursuant to Supreme Court Rule 15.6, petitioners address the following new points raised in the Brief in Opposition.

1. **Petitioners had an employment contract to which the impairment analysis of the Puerto Rico Supreme Court applies.**

Respondents allege that petitioners have failed to identify any contract to which they are parties that would be impaired by the legislation under challenge. Brief in Opp., p. 2. They are mistaken. Respondents' contractual obligations with petitioners arise from respondents' appointment of petitioners as public employees after a formal recruitment process according to Puerto Rican law. The terms of the contract are contained in the relevant documents given to petitioners, extending their respective appointments, with a description of their functions, salaries and other working conditions, as well as in the statutes and regulations controlling public employment in Puerto Rico. The appointment documents, signed by government representatives, were also signed by the petitioners as a stipulation of their consent to the duties they assumed and to the conditions of their employment.

The Commonwealth of Puerto Rico has established through legislation the process through which public employees will be contracted based on the merit principle. See Act No. 184 of August 3, 2004, known as Public Service Human Resources Administration Act of the Commonwealth of Puerto Rico, 3 L.P.R.A. § 1461 *et seq.* The Human

Resources Administration System is the entity that applies, evaluates and protects the merit principle within the public service. 3 L.P.R.A. § 1461c. That principle is defined as the basis through which all public employees will be selected, promoted, retained and treated in all matters concerning their employment based upon their capability and without discrimination. 3 L.P.R.A. § 1461(42). The following essential areas to the merit principle are applicable to the Public Service Human Resources Administration System, except for confidential service: (1) classification of positions; (2) recruitment and selection; (3) promotions, transfers, and demotions; (4) training; and (5) retention. 3 L.P.R.A. § 1462.

As an effective instrument to attain the implementation of Government programs, each appointing authority will be responsible for establishing and maintaining a rational structure of functions that leads to the greatest uniformity possible and which serves as a basis for actions concerning personnel. 3 L.P.R.A. § 1462a. An agency is therefore required to prepare an organizational structure comprised of work units as well as a written description of each job, a copy of which will be given to each employee. *Id.* The job description will be made in a manner such that it serves to illustrate the employee about the general, essential and marginal functions he or she must perform, as well as the purpose of each function, in order to enable the nominating authority to properly fulfill its public endeavor. *Id.* The jobs are then arranged into classes or their equivalent on the basis of elements that are similar, in order to be able to

demand from their occupants to meet equal requirements, as well as the same criteria for their selection so that the same compensation may be applied. *Id.*

Upon the establishment of a classification plan, the agency recruits its personnel through the established recruitment process. Once the applicant goes through the recruitment and selection process, he or she is appointed by the nominating authority in a standard document which establishes the terms of the contractual relation between the employee and the state, to wit, the position of the employee, his classification under the retribution plan of the agency, the salary awarded, the probationary period, the starting date and the area wherein the job is located. This document is signed by the employee accepting in turn the conditions of the documents, thereby consummating the contract between the state and the employee. See, for example, 3 L.P.R.A. § 1462b.

Within the personnel system, career employees[1] with regular status will have a secure job as long as they satisfy productivity, efficiency, habit, attitude, order and discipline standards that should prevail in the public service. Such standards will be established on the basis of the functions of the jobs,

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[1] Career employees are those that have been admitted into the public service in faithful compliance with the established body of laws in effect and applicable to the recruitment and selection processes of the career service at the time of their appointment. 3 L.P.R.A. § 1465.

the duties and the obligations, among other factors, as provided for further in the Public Service Human Resources Administration Act of the Commonwealth of Puerto Rico, as well as such others that, in agreement with the operational function of each agency, are necessary for the rendering of services. 3 L.P.R.A. § 1462e. See *Torres Solano v. P.R.T.C.*, 127 D.P.R. 499, at 523 (1990) (characterizing the relation between a government employee and the state as a "contract" by stating that "a public employee is entitled to a pretermination hearing even when the statute or contract which grants him tenure does not provide for it...").

In *Ortiz v. Aut. Edificios Públicos y Junta*, 121 D.P.R. 896, 905 (1988), the Supreme Court of Puerto Rico held that an agency's regulations and the merit system were "part of the employees' work contract, which as the law provides, is an individual work contract". This notion has become ingrained in Puerto Rico's public employment law. Thus, in a concurring opinion in *Aponte v. Srio. de Hacienda, E.L.A.*, 125 D.P.R. 610 (1990), Associate Justice Negrón García stated that: "Definitely, the old doctrine that denied the contractual nature of the State-public employee relation has been clearly surpassed." *Id.* at 632 (translation supplied). He proceeds by stating:

> Because the Constitution does not provide a collective bargaining framework to govern relations between the State and its employees, it is obvious that the changes relating to

> wages and other economic benefits are strictly governed by the applicable legislation. In this sphere, the original source of any obligation is the law. However, this conclusion does not denaturalize the essence of that relationship nor the contractual character of the obligation that emerges with reference to the wages of government employees. Once in force the legislation that allows them...is incorporated into the government service contract between the State and the public employee.

Aponte v. Srio. de Hacienda, E.L.A., supra at 633. (Translation supplied).

Following this line of reasoning, Associate Justice Fiol Matta stated that in the instant case the impairment analysis forcibly included the effect of Act No. 7 on individual employment contracts such as those held by petitioners herein, as well as the effect on collective labor agreements. Pet. App. D at 160a. She added:

> No doubt, there is a contractual obligation between the corresponding central government agencies and their employees.... In both cases, there are signed contracts, whether individual or collective, where the working conditions, wages and the rights and obligations of each party are

established. Prior to the enactment of Act No. 7 of 2009 these contracts were protected by the laws of public service personnel, Act No. 184 of 2004 and, the Labor Relations Act, Act No. 45 of 1998, among other labor laws of the country.

> In the case of individual employment contracts, the impairment that Act No. 7 of 2009 provoked was severe. Specifically, this legislation ended completely and indefinitely existing contractual obligations with employees. As a result of massive layoffs, thousands of employees lost their jobs. Furthermore, the Act limited the appellate jurisdiction of the Appeals Commission for the Human Resources Administration System (CASARH, in Spanish), so that it could only review cases that raise seniority issues. More specifically, the principle of merit was rendered inoperative and the functioning of the Human Resources Administration System was affected.

Emphasis in the original, footnotes omitted. Pet. App. D at 161a-162a.

The idea that contracts may emerge from a statute or a statutory scheme is not new in the federal sphere. In *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), the very case which is so

central to this petition for a writ of certiorari, this Court established that "[i]n general, a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State." 431 U.S. at 18 n. 14. In fact, the covenant found to be unconstitutionally impaired in *United States Trust Co.* had been created by a statute. 431 U.S. at 18. In the instant case, the state's contractual obligations arise from its actions recruiting and appointing petitioners (who in turn accepted the appointment) to their jobs and from the elaborate statutory framework adopted to regulate their public employment. The outright termination of these employment contracts is the basis for petitioners' impairment claim.

2. Petitioners raised their federal contract impairment claim properly.

Respondents also assert that petitioners did not raise their federal Contract Clause claim in the Puerto Rico courts. Brief in Opp., p. 13. They are mistaken again. Since this point was extensively briefed in the petition for a writ of certiorari, at pp. 7-12, it will suffice to recall that, given the hasty certification procedure followed by the Supreme Court of Puerto Rico in this case, petitioners raised their federal claim as soon as their case arrived at the Supreme Court, barely seven days after the complaint was filed with the Court of First Instance. In sum, references to the federal contracts clause claim appear in (a) petitioners' Motion Requesting Provisional Order, dated October 19, 2009, Pet. App.

R; (b) Petitioner's Answer to the Opposition to the Motion Requesting Provisional Order in Aid of Jurisdiction, dated October 22, 2009, Pet. App. U; (c) Petitioners' Respondent's Brief, dated October 29, 2009, Pet. App. AA; (d) Respondents' Pleading of the Petitioner, Pet. App. BB; (e) Majority Opinion, Pet. App. A; (f) Chief Justice Hernández Denton's dissenting opinion as well as his particular vote of February 19, 2010, Pet. App. C and G; (g) the Particular Vote issued by Justice Rivera Pérez on February 19, 2010, Pet. App. F; and (g) the dissenting opinion and Particular Vote written by Associate Justice Fiol Matta, Pet. App. D and H.

It is to be noted that Justice's Rivera Pérez's extensive Particular Vote was joined by the other three members of the court constituting the majority in the court's initial judgment. This amounted to a second majority opinion. Nowhere in the Justice's discussion of the federal impairment of contracts' issue in that particular vote is a distinction made between individual and collective agreements. It is by now settled that "[i]n framing the federal question for presentation to the state court, the litigant is not bound to follow any particular form of words or phrases." Eugene Gressman *et al.*, Supreme Court Practice 183 (9th ed. 2007). More specifically, this Court has stated that:

> There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of

> words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928).

This was clearly done by petitioners. Moreover, the basic rationale for the requirement that the federal question be properly raised in the lower state court is to give state courts the opportunity to first consider the applicability of state statutes in light of the federal constitutional challenge. *See Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). This Court has indicated that: "[o]f course the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough." *New York ex rel. Bryant v. Zimmerman*, *supra* at 67. The Supreme Court of Puerto Rico had ample opportunity here to pass on the question and dedicated extensive passages to discuss the federal Contracts Clause claim in its decision and in the several concurring and particular votes of its members, and particularly in the opinion of Justice Pérez, supported by the majority of that court. Nothing more is required for petitioners to be

able to ask this Court to review that court's decision on this important federal question.

3. The Supreme Court of Puerto Rico has misconceived, misinterpreted and misapplied the rulings of this Court.

Respondents' conclusion that the Supreme Court of Puerto Rico followed and properly applied the doctrine established by this Court in *United States Trust Co.*, Brief in Opp., at pp. 18-21, is unsustainable. It is true that the Puerto Rico Supreme Court transcribed exactly the wording employed by this Court in that case when articulating the standard to be used in cases involving the impairment of public contracts. But what the Supreme Court actually did when deciding the case was quite the opposite. Its total deference to the Puerto Rico legislature, relying solely on the text and statement of purposes of Act No. 7, subverted the import of this Court's *United States Trust Co.* standard. It is not enough for a reviewing court to render lip service to a constitutional standard by repeating verbatim what the U.S. Supreme Court has said, if it then goes on, in practice, to apply the opposite standard without expressly articulating it. This is exactly what happened here. This is more than enough reason for this Honorable Court to intervene in this case.

It is inexact to say, as respondents argue, that the Supreme Court of Puerto Rico merely did what courts uniformly do: examine the face of the law and the related materials of which courts can take

judicial notice to determine whether the State has demonstrated that the impairment of contractual obligations was "reasonable and necessary to serve an important public purpose." Brief in Opp., at p. 26.

The truth of the matter is that the Supreme Court of Puerto Rico only looked at the text of the law and its statement of purposes. It did not even examine Act No. 7's legislative history. In fact, on February 22, 2010, twenty days after the initial decision was rendered by the Puerto Rico Supreme Court in the instant case, and while petitioners' request for reconsideration was pending, for the first time the government moved for the court to take notice of the legislative record of Act No. 7 submitted in another case. This is indeed a telling indication of the government's own awareness of how bare was the record on which the court had based its decision of February 2, 2010. The Supreme Court of Puerto Rico never ruled on this motion presented by the government. Its cryptic resolution denying petitioners' motion for reconsideration did not address or even mention the government's motion nor did it make any reference to having taken notice of Act No. 7's legislative record. Pet. App. I, p. 287a.

But even if the court had had before it the entire legislative record of the challenged legislation, its decision still would have been flawed on account of the court's failure to grant petitioners the opportunity to rebut the legislature's factual allegations about the nature of the alleged crisis and the reasonableness and necessity of its dismissal plan.

4. Conclusion

For all the above reasons, and those expressed in the petition for a writ of certiorari, this Court should issue the writ sought by petitioners or in the alternative the court may wish to consider summarily reversing the judgment of the Supreme Court of Puerto Rico.

Respectfully submitted,

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